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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT LAW

**ON AMENDING AND SUPPLEMENTING
THE LAW ON INTELLIGENCE AND SECURITY SERVICE
AND
THE LAW ON SPECIAL INVESTIGATIVE ACTIVITY**

OF THE REPUBLIC OF MOLDOVA

Information note to the draft Law on amending and supplementing certain legislative acts

On 29 March 2012, the Law on Special Investigative Activity no. 59 was adopted by the Legislature. The mentioned legislative act institutes a unique mechanism for conducting special investigative measures, both for organs maintaining public order and state security bodies. Unfortunately, this unique mechanism does not take into account the particularities of the activity performed to ensure the state security, the fact that resulted in impossibility of the Intelligence and Security Service to fulfill its duties established by law and, practically, annihilated the mechanisms and procedures ensuring the security of the state and society, as a whole.

The most effective special investigative measures can be carried out merely within a criminal case after a crime has been committed. However, the aim of Service's work is to prevent acts that may harm the state security, anticipate and counter them through non-criminal measures. Moreover, the Service has no criminal prosecution body and cannot initiate criminal cases.

In order to create a legal basis for proper activity of the Service, taking into account the international practice, as well, it is proposed to amend the Law no. 753-XIV of 23 December 1999 on the Intelligence and Security Service of the Republic of Moldova and the Law on Special Investigative Activity no. 59 of 29 March 2012.

Based on the specific activity of the Intelligence and Security Service and the purpose of this institution – ensure the state security, the pressing need is looming to enable the Service to perform the full spectrum of special investigative measures outside of a criminal trial. However, given the considerable degree of interference with fundamental human rights characteristic to some of the measures, it is required the utility to establish a highly accurate procedure for their authorization, to create sufficient guarantees for not allowing abuse or violation of fundamental rights.

Thus, establishing the security mandate was considered as optimal solution - a new law institute for the national legal system. Security mandate is the act by which a specially appointed judge in the courts of appeal is authorizing to carry out special investigative measures (one of those referred to in Art. 18 para. (1) item 1) of the Law on Special Investigative Activity).

The security mandate shall be issued in case of available information related to planning or committing deeds particularly threatening state security or endangering public safety (for example - espionage, treason, actions aimed at overthrowing by violence of legally elected public authorities, terrorist acts, etc.), the list of these facts being expressly stipulated by law - Art. 7 letters a) and d) of the Law no. 753/1999 and Art. 4 para. (2) from the State Security Law no. 618 of 31 October 1995.

The Law no. 59/2012 stated that monitoring or control of financial transactions and access to financial information can merely occur within a criminal case and only upon authorization of the instruction judge. This obligation comes in direct contradiction with the principle of intrusive non-interference into privacy of an individual and the situation existing before adoption of the Law in question never raised any human rights issues. At the same time, the norms concerned are coming into collision with Art. 22 para. (5) letter h) of the Law on Financial Institutions no.

550 of 21 July 1995 which compels financial institutions to provide any information to the Service in the context of ensuring state security, at its request, without any bureaucratic procedures.

Given the fact that financial information is of paramount importance to examine the perils for the financial and economic security of the state, as well as in the context of countering terrorism financing and other extremist activities, since that access to financial information does not present an excessive intrusion into the private life and in case of control of transactions made by a legal entity nor can it be about privacy, we consider it appropriate to regulate the access of the Service to financial information, exclusively, through the Law no. 550/1995.

The Law no. 59/2012 repealed the Law on Operative Investigation Activity no. 45 of 12.04.94 while the new legislative act omitted to regulate such important relationships as the legal regime of special technical means intended to obtain information in a hidden way, previously governed by the rules of Art. 6 para. (4¹) – (4³) of the Law no. 45/1994. The existence of such rules is imperative and their exclusion has created a legal vacuum resulting in diminishing state control over special technical means intended to obtain information in a concealed way. Lack of regulations prohibiting the possession of special technical means for hidden obtaining of information by persons other than state authorities empowered to conduct special investigative measures, seriously undermines the person's right to privacy and, simultaneously, makes inapplicable the norms of Art. 261 and 262 of the Contravention Code and Art. 301¹ of the Criminal Code. In order to remedy this legislative gap, we suggest exposing Art. 18 para. (5) of the Law no. 59/2012 in a new version and completing this article with three new paragraphs (5¹) – (5³).

In accordance with the current rules of Art. 22 para. (6) and (7) of Law no. 59/2012, there is an absolute obligation to inform the person about all the special investigative measures performed with regard to him /her. When conducting special investigative measures in order to ensure state security, the notification of a person about the fact he /she has been the subject of an investigation can affect national security or endanger the performance of another investigation. In these cases, we proposed to establish an exception to the general rule.

Supplementing Art. 29 of the Law no. 59/2012 is meant to flesh out the mechanism for visual tracking. According to the actual wording of the given norm, visual tracking is performed without use of technical means of fixing the revealed, which makes useless such a special measure. The proposed addition will enable the use of audio, video technical means upon fixing actions of persons who are under visual tracking and would allow detailed and efficient documentation of respective measures.

THE PARLIAMENT OF THE REPUBLIC OF MOLDOVA

LAW

on amending and supplementing certain legislative acts

The Parliament adopts this organic law.

Article I. - Law no. 753-XIV of 23 December 1999 on the Intelligence and Security Service of the Republic of Moldova (Official Gazette of the Republic of Moldova, 1999, no. 156, art. 764), with subsequent modifications and completions, is amended and supplemented as follows:

1. In the introductory part, Article 7 is completed after the word "measures" with the words "including those provided by Law no. 59 of 29 March 2012 on special investigative activity, "

2. A new article 7¹ is added, having the following content:

„Article 7¹. Security mandate

(1) In performing its duties, to collect information about possible events and /or actions that could jeopardize the state security, the Service may carry measures foreseen in Art. 18 para. (1) item 1) of the Law no. 59 of 29 March 2012 on special investigative activity, outside a criminal trial, under a security mandate.

(2) In accordance with the provisions of Art. 22 para. (5) letter h) of the Law on Financial Institutions no. 550 of 21 July 1995, by derogation from the provisions of paragraph (1) of this article, the special measure for investigations in Art. 18 para. (1) letter f) of Law no. 59 of 29 March 2012 on special investigative activity is carried out without a security mandate, outside a criminal trial, only insofar as it relates to access to financial information.

(3) The security mandate is issued by a reasoned conclusion of a special judge appointed in the courts of appeal upon a motivated request of the Director of Intelligence and Security Service or a Deputy Director specially empowered in this regard.

(4) The application for issuance of a security mandate may be submitted in any of the courts of appeal, being reviewed by a judge specially designated for this purpose and who has the right of access to state secrets granted under the Law on State Secret. The request is supported before the court by an intelligence and security officer authorized for this purpose by the Director of the Service. Examination of the request for issuance of security mandate takes place without delay but not later than 4 hours after submission. If the application initially submitted to one of the courts of appeal was refused, its repeated filing on the same grounds and the same person at a different court of appeal is prohibited.

(5) The request for issuance of a security mandate contains data concerning: name, surname, position of the person who applied for issuance of mandate; identification data of the person subject to the measure, if known; special investigative measure for which authorization is sought, the factual circumstances

that serve as a basis for conducting special investigative measure and, where appropriate, their possible consequences; the results that are expected to be achieved after performing special investigative measure; time limits for performing such measure; the place of conducting the respective measure; other data that are important to justify the necessity of special investigative measure which would ensure its legal and grounded approval.

(6) The court decision on issuance of a security mandate contains the following data: name, position of the person who applied for issuance of the mandate; identification data of the person subject to the measure, if known; data justifying the need for performing and, respectively, authorizing the measure; special investigative measures authorized to be performed; time limits for performing such measure; the place of conducting the respective measure; other data that are important for justifying the authorization of the measure.

(7) A security mandate may be issued regarding both an identified and unidentified person, with reference to which information is available that he /she prepares, undertakes attempts to commit or has committed one or more of the acts specified in Art. 7 letters a) and d) of the present Law or Art. 4 para. (2) from the State Security Law no. 618 of 31 October 1995, as well as with respect to persons who, in any way, contributed or contribute to committing those acts.

(8) By derogation from the provisions of the Code of Criminal Procedure, the maximum term for which conduct of special investigative measures can be authorized, as specified in para. (1), is 6 months. If necessary, the term for carrying out the measure may be extended by up to 3 months, the number of extensions being unlimited. Each request for extension of time for carrying out the special investigative measure, the judge must examine the circumstances justifying the need for this extension and in case of considering the request unreasoned, he /she may refuse extension.

(9) Judge's conclusion concerning refusal of issuing a security mandate or the refusal to extend the term for conducting the special investigative measure may be appealed within 5 working days to the President of the Supreme Court of Justice.

(10) The special investigative measures mentioned in para. (1), as an exception, may be conducted without a security mandate based on a reasoned decision of the Director of Service or the specially empowered Deputy Director when exceptional circumstances exist that do not allow postponement and the security mandate cannot be obtained without existence of an essential risk of delay which can lead to loss of relevant information or immediately endanger safety of persons. In this case, the judge will be informed about it within 24 hours from ordering the measure, being put at his /her disposal all the materials containing substantiated need for conducting the special investigative measure and circumstances that did not allow its postponement. If there are sufficient grounds, the judge is confirming through a reasoned ruling the legality of the conducted measure or, where appropriate, is declaring the illegality of its conduct, ordering its termination and destruction of the material carrier of information along with the materials accumulated during the conduct of special investigative measure. The reasoned ruling of the judge can be

appealed in terms of para. (9). Appeal suspends the destruction procedure of material carrier of information and accumulated materials.

(11) The request for issuance of a security mandate, the court decision regarding the security mandate, as well as other materials of the file on security mandate constitute a state secret."

Article II. – The Law on Special Investigative Activity no. 59 of 29 March 2012 (Official Gazette of the Republic of Moldova, 2012, no. 113-118, Art. 373), with subsequent amendments, is amended and supplemented as follows:

1. Article 18:

a new paragraph (3¹) is added, having the following content:

„(3¹) The Intelligence and Security Service, in case of gathering information about possible events and / or actions that can jeopardize the state security, may carry out measures provided for in para. (1) item 1) and item 2) letters c), e) and f) outside the criminal trial.”

paragraph (5) is given in the following wording:

„(5) While carrying out special investigative measures, use is made of information systems, video and audio recording equipment, photo and filming cameras, other technical means including specially designed ones for hidden obtaining of information.”

three new paragraphs (5¹) – (5³) are added, having the following content:

„(5¹) The classifier of special technical means designed for hidden obtaining of information while carrying out special investigative activity and the regulation regarding import, export, design, production and marketing of such means shall be approved by the Government.

(5²) The activity regarding import, export, design, production and marketing of special technical means for hidden obtaining of information is performed just for competent bodies entitled to exercise special investigative activity, intelligence or counterintelligence activities.

(5³) The use of special technical means specially designed for hidden obtaining of information by unauthorized for that under law physical and legal persons is forbidden.”

2. Article 20:

is completed with paragraph (1¹) having the following content:

(1¹) By derogation from the provisions of para. (1), special investigative measures specified in art. 18 para. (1) item 1) in the cases stipulated in art. 18 para. (3¹), are authorized under the Law no. 753-XIV of 23 December 1999 on the Intelligence and Security Service of the Republic of Moldova.”;

3. Article 22:

para. (6) shall be completed in the end by the phrase "except cases when informing the person would affect national security.”

para. (7) shall be completed in the end by the phrase "except for the information attributed to state secret"

4. Article 29 shall be supplemented by the words "with or without use of technical means other than those special ones intended for hidden obtaining of information".

Article III.

(1) The presidents of courts of appeal shall designate, within up to one month from the date of publication of this law, judges specifically empowered to issue security mandates and will initiate the procedure of granting them the right of access to state secrets.

(2) This law shall enter into force on the date of its publication.

Chairman of Parliament